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No. 417.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929.

THOMAS A. BALDWIN, THOMAS A. BALDWIN, EXECUTOR OF THE WILL OF CARRIE POOL BALDWIN, ET AL., ETC., PLAINTIFFS IN ERROR AND APPELLANTS,

VS.

STATE OF MISSOURI.

IN ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI.

BRIEF, COMPILED AND FORMULATED TO SHOW CAUSE WHY THE WRIT OF ERROR AND THE APPEAL HEREIN SHOULD NOT BE DISMISSED FOR WANT OF A FINAL JUDGMENT.

JOHN F. GARNER,
Counsel for Appellants.

HARRY CARSTARPHEN,
Of Counsel.

(34548)

(34548)

SUPREME COURT OF THE UNITED STATES.

October Term, 1929.

No. 417.

Thomas A. Baldwin, Thomas A. Baldwin, Executor of the Will of Carrie Pool Baldwin, et al., etc., Plaintiffs in Error and Appellants,

vs.

State of Missouri.

In Error to and Appeal from the Supreme Court of the State of Missouri.

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VS.

STATE OF MISSOURI.

IN ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI.

BRIEF, COMPILED AND FORMULATED TO SHOW CAUSE WHY THE WRIT OF ERROR AND THE APPEAL HEREIN SHOULD NOT BE DISMISSED FOR WANT OF A FINAL JUDGMENT.

The opinion of the court below, the Supreme Court of the State of Missouri, which is not yet officially reported, was rendered on June 29, 1929 (rehearing denied August 2, 1929), and bears No. 28664. The case

may be found printed in 19 (2) South Western Reporter 732 to 740, where it is styled *State* v. *Baldwin's Estate,* also see printed Transcript of Record herein, pages 30 to 47.

To definitely recognize and present the question of final judgment in the light of the law and practice of the State of Missouri, we quote the directing portion of the opinion of the court below, and also of the concurring opinion. From the opinion of the Supreme Court of the State of Missouri (Printed Transcript of Record page 30, local citation 37):

> "The judgment is reversed and the cause remanded with directions to the trial court to proceed in accordance with this opinion."

From the concurring opinion (Printed Record 38, loc. cit. 47):

> "For the reasons stated, so much of the judgment of the circuit court in this case is reversed which holds that the intangible personalty in this state belonging to the estate of Carrie Pool Baldwin is not subject to the payment of an inheritance tax; and the court is directed to enter up a judgment in conformity with this opinion."

STATEMENT.

The State of Missouri, under its inheritance tax law, seeks to tax the intangible personal property of a nonresident decedent.

Carrie Pool Baldwin died in Quincy, Illinois, on October 4th, 1926, a resident of Illinois. Her will was probated in Illinois and ancillary letters of administration with will annexed were issued in Lewis County, Missouri, on October 22nd, 1926. The estate consisted of lands in the States of Illinois and Missouri and intangible personal property in the form of notes, bonds and bank deposits.

The Probate Court of Lewis County, Missouri, rendered judgment taxing the transfer of not only the lands but also the intangible personal property. This judgment was by way of approving the report of the appraiser by that court. Exceptions were filed in the probate court by the legatee under the will and the administrator with will annexed in Missouri making attack upon the judgment and Missouri statute on the grounds of violation of due process, denying equal protection of the law, and abridging the privileges of the citizens of the United States and of the states, all as guaranteed by the Constitution of the United States, which motion was overruled and the case was, on appeal to the Circuit Court of Lewis County, Missouri, tried anew to the result that the trial court found that the intangible personal property of a non-

resident decedent was not taxable in Missouri. The cause was thereon by the State of Missouri appealed to the Supreme Court of Missouri, where the Supreme Court of Missouri in effect (R. 30 to 47) affirmed the judgment of the Probate Court of Lewis County, Missouri, and remanded the case and directed that judgment be entered up in accordance with the opinion of the Supreme Court. The final judgment was of the highest court of the state, being, under the circumstances, that of the Supreme Court of Missouri.

BRIEF AND ARGUMENT.

The state practice and laws control the question of whether the judgment is final.

The state laws and practice shall control for determination of the question of final judgment in the state court.

Mergenthaler Linotype Co. v. *Davis,* 251 U. S. 256, loc. cit. 258:

> "Under the Missouri practice and circumstances here disclosed, we think the judgment of the Springfield Court of Appeals was final within the meaning of Section 237, Judicial Code, (28 U. S. C. A. Section 344). No suggestion is made that further review by the Supreme Court could be had, as matter of discretion or otherwise."

Salomon et al. v. *State Tax Commission of N. Y.,* 278 U. S. 484, loc. cit. 486:

> "By the remittitur it became the judgment of the Surrogate's Court. That judgment is final within the meaning of 28 U. S. C. A. Section 344."

Missouri practice, laws and statutes on final judgment appealed from probate court.

Under the laws of Missouri the inheritance or transfer tax upon the estate of a decedent shall be determined in that probate court where letters testamentary are issued (see Section 570, Missouri Statutes, in Appendix hereof, page 13).

An appeal lies from the judgment of the probate court fixing inheritance tax as in other civil actions (see Section 572, Missouri Statutes, in Appendix hereof, page 14).

Appeals lie generally from the probate courts of Missouri to the circuit courts (see Section 282, Missouri Statutes, in Appendix hereof, page 14).

Upon appeal from the probate court the clerk thereof is required to make a transcript of the record and proceedings and send the same with the original papers to the circuit court thereof where the case is determined anew. Thereupon and after determination in the circuit court the clerk of the circuit court certifies back the original papers and record to the probate court "who shall proceed according to the decision of the circuit court" (see Sections 288, 289 and 291, Missouri Statutes, in Appendix hereof, page 14).

It is the settled law of Missouri that under Section 291 of the Revised Statutes of Missouri 1919, the case must be remanded with directions to proceed according to the decision (in the appellate court commonly called an opinion) of the circuit court. When (in a case involving an appeal from a probate court) an appeal is perfected from the circuit court to an appellate court of the State of Missouri the appellate court determines the law for and in the stead of the circuit court, hence remands the case to the circuit court with directions that the circuit court may in turn remand the case to the probate court with directions.

In re Hamill's Estate, 315 Mo. 972.

In re Taylor's Estate, not yet officially reported, decided by St. Louis Court of

Appeals on May 1, 1928, Nos. 20115 and 20116, printed in 5 (2) South Western Reporter 457, loc. cit. 461.

"It is well settled in our jurisprudence (see the late case of *In re Hamill's Estate,* 315 Mo. 972), that, under Sections 289, 291, Revised Statutes of Missouri of 1919, the circuit court on appeal from the probate court, must make definite findings and *directions* for procedure in the probate court. It is further stated in that case that it is the judgment of the circuit court which determines and defines the rights of the parties; that determination having been made and entered of record the clerk of the circuit court is required, under Section 291, R. S. 1919, to 'certify a transcript of the record and proceedings and the original papers to the court whence the appeal was taken, who shall proceed according to the decision of the circuit court.' For that purpose, the judgment of the circuit court should be definite in its findings and in its directions, so as to inform the probate court how to proceed."

A discussion of the application of the statute (Section 291, R. S. of Mo. 1919) is given by the Supreme Court of Missouri in the earlier case of *State ex rel. Baker* v. *Bird*, 253 Mo. 569, however that case arose on an Original Prohibition in that Supreme Court.

Appeal from Missouri Probate Court must be remanded though affirmed.

Had the Supreme Court of Missouri affirmed this case instead of reversing it in part, it would have, nevertheless, under the laws of Missouri, remanded the cause.

Wharton v. *Denny*, No. 15952, not yet officially reported, decided in Kansas City Court of Appeals on June 6, 1927, opinion by

Commissioner Frank now a member of the Supreme Court of Missouri, and who concurred in the opinion here attacked. Printed in 296 South Western Reporter 183.

It is therefore apparent that the fact that the cause was remanded to proceed in accordance with directions, furnishes no standard whereby to conclude that the matter is not ended by final judgment or decree of the highest court of the State of Missouri.

Only Ministerial Duties Remained to Be Performed.

Where the mandate issued in this case from the Supreme Court of Missouri followed back through the circuit court into the probate court, the same judgment would be rendered by the probate court as was first rendered in that court, that is, that the intangible personal property of the nonresident decedent was subject to inheritance tax the same as Missouri real estate. Thereupon a reentering of the same judgment by the probate court and a series of new appeals resulting in a finding of *res adjudicata* by the Supreme Court of Missouri and a remanding with directions would leave this appellant without right of appeal as appeal should have been from the first judgment. Hence the present judgment is the one to be appealed from.

Rio Grande Western Railway Co. v. *Stringham*, 239 U. S. 44:

> "Manifestly the first judgment was final within the meaning of Judicial Code, Section 237 (28 U. S. C. A. Sec. 344) * * * It disposed

of the whole case on the merits, directed what judgment should be entered, and left nothing to the judicial discretion of the trial court."

The opinion of the Supreme Court leaves open no question for determination by a trial court. The only question on the appeal is the authority of the State of Missouri to tax the intangible personal property of the nonresident decedent. While the opinion states that it would have been a proper subject of inquiry to determine on what condition the evidences of debt were in Missouri, in the same sentence it is stated that such fact made no difference for the intangible personal property *was* subject to inheritance tax in the state regardless. Every subject of inquiry is closed by the opinion, the amount of appraisal is fixed, the law fixes the rate and the matter is closed.

Gulf Refining Co. of La. et al. v. *United States*, 269 U. S. 125, loc. cit. 136:

"The instruction for further proceedings not inconsistent with the opinion, therefore, was equivalent to a direction to render judgment for the net value—that is, for the exact sums set forth in the stipulations. * * * There was no evidence to be taken or considered, and no change in the issue was possible; nothing remained but the ministerial duty of entering a decree for the precise sums which had been fixed beyond the power of alteration. It follows that the jurisdictional objection is without merit."

Moore v. *New York Cotton Exchange, et al.*, 270 U. S. 593.

Chesapeake & Potomac Telephone Co. v. *Manning*, 186 U. S. 238.

Mower v. *Fletcher*, 114 U. S. 127.

In the instant case only the ministerial duty devolved upon the circuit court to certify the original papers back to the probate court from whence they came with a transcript of the record and proceedings. No judicial act was required. Since the clerk of the Supreme Court of Missouri is directed by law to forward a true copy of the opinion to the circuit court from which the case was appealed (Section 1520, R. S. of Missouri 1919, see Appendix hereof, page 15), such opinion would become a part of the proceedings of the circuit court and would thereupon be transmitted to the probate court. It will be remembered that the original judgment in the probate court found the intangible personal property of the nonresident decedent taxable.

The opinion of the Supreme Court of Missouri comprises the mandate.

Under said Section 1520, R. S. of Missouri, 1919, it is to be observed that the opinion of the Supreme Court of Missouri is or constitutes the body of the mandate. The opinion of the court and the concurring opinion constitutes a straight forward direction to the circuit court "to proceed according to this opinion." The concurring opinion directs "to enter up judgment in conformity with this opinion." Nothing was left for the circuit court and probate court to do but enter up judgment.

Metropolitan Water Co. v. *Kaw Valley Drainage District*, 223 U. S. 519.

Gulf Refining Co. of La. v. *United States*, 269 U. S. 125, loc. cit. 135:

> "But the direction to proceed consistently with the opinion of the court has the effect of making the opinion a part of the mandate, as though it had been therein set out at length."

Conclusion.

There are numerous cases of the Supreme Court of the United States, seeking to lay down a test of final judgment applicable to all cases and situations, that have suggested that when the word *proceed* is used upon the remanding of the case that such word characterizes judicial discretion in the court *nisi*. As perfect as that rule may be when applied to situations apart from state statutes, it will be observed that it does not apply in the case at hand because the statutory law of Missouri (Section 291, Missouri Statutes 1919, see Appendix page 15), reads "shall *proceed*" according to the decisions. From the cases cited herein above it will be seen that this statute has been construed in accordance with its plain language, and that in every instance of appeal from the probate court in Missouri, whether the matter is affirmed or reversed, it must be remanded to *proceed*. Therefore if the test that some of the opinions of the Supreme Court of the United States adopt might be construed to the effect that the word *proceed* when contained in a judgment in connection with the remanding of the case means that the judgment is not final, there could never

be a final judgment in the courts of the State of Missouri on a matter of appeal from a probate court.

Of necessity, this court in determining the jurisdiction of the highest court of the state must look to the state statute and the opinions of the court construing such statute to ascertain if the judgment is final by the highest court of the state.

Mergenthaler Linotype Co. v. *Davis*, 251 U. S. 256.

It is therefore respectfully submitted that the judgment is final and this court has jurisdiction.

JOHN F. GARNER,
Counsel for Appellant.

HARRY CARSTARPHEN,
Of Counsel.

APPENDIX.

(A revision of the Missouri Statutes was made by the 1929 General Assembly of Missouri, but it is not yet published and distributed.)

The following citations of Missouri Statutes are by section number of the 1919 Revised Statutes of Missouri with reference to the Session Acts where amendments have been made and published in the Session Acts by the biennial sessions of the General Assembly.

Section 570, Revised Statutes of Missouri 1919, Chapter 1, Article XXI, amended 1921, Session Acts 1921, page 672:

> "*The probate court* which grants letters testamentary or of administration, either original or ancillary, on the estate of any decedent, shall have jurisdiction to determine the amount of the tax provided for in this act and the person, persons, association, institution or corporation liable therefor, and to determine any question which may arise in connection therewith, and to do any act in relation thereto which is authorized by law to be done by such court in other matters or proceedings coming within its jurisdiction. Such court or the judge thereof in vacation shall immediately upon the filing of the inventory and appraisement of the estate of a decedent, examine the same, and if it is apparent, in the opinion of the said court or judge, that such estate is not subject to the tax provided for in this act, such finding and opinion shall be entered of record in said court * * *" (italics ours).

Section 572, Revised Statutes of Missouri 1919, Chapter 1 Article XXI:

"Any interested person, including the state treasurer, attorney general or prosecuting attorney of the county may file exceptions to the report of the appraiser within thirty days after the time same is filed, specifically pointing out his or their objection thereto, and such exception shall be determined by the court in a summary manner. Any person aggrieved by the judgment of the court as to the amount of liability for the tax may appeal to the court having jurisdiction of appeals from said court *in ordinary civil actions* * * *" (italics ours).

Section 282, Revised Statutes of Missouri 1919, Chapter 1, Article XII:

"Appeals shall be allowed from the decision of the probate court to the circuit court, in the following cases: First, * * * fifteenth, and in all other cases where there shall be a final decision of any matter arising under the provisions of Articles I to XIII, inclusive, of this chapter. And the right of appeal herein provided for shall extend to any heir, devisee, legatee, creditor, or other person having an interest in the estate under administration."

Section 288, Revised Statutes of Missouri 1919, Chapter 1, Article XII:

"When such appeal is taken the clerk shall transmit to the clerk of the circuit court or other court having appellate jurisdiction in the county, a certified transcript of the record and proceedings relating to the case, together with the original papers in his office relating thereto."

Section 289, Revised Statutes of Missouri 1919, Chapter 1, Article XII:

"Upon the filing such transcript and papers in the office of the clerk of the circuit court or

other court having appellate jurisdiction in the county, the court shall be possessed of the cause, and shall proceed to hear, try and determine the same anew, without regarding any error, defect or other imperfection in the proceedings of the probate court."

Section 291, Revised Statutes of Missouri 1919, Chapter 1, Article XII:

"The clerk of the circuit court or other court shall certify a transcript of the record and proceedings and the original papers to the court whence the appeal was taken, who shall proceed according to the decision of the circuit court."

Section 1520, Revised Statutes of Missouri 1919, Chapter 12, Article XVI:

"The clerk of the supreme court shall, when the opinion of the court is filed in his office, indorse thereon the day on which it is filed, and enter the same on his minutes, and shall within thirty days thereafter, make a true copy thereof, and shall transmit the same without delay to the circuit court or other court from which the same was taken."

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VS.

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In Error To and Appeal From The Supreme Court of The State of Missouri.

BRIEF ON THE MERITS IN SUPPORT OF ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI.

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(34548)

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BRIEF ON THE MERITS IN SUPPORT OF ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI.

I.

OPINIONS OF THE COURT BELOW.

The opinion in the Supreme Court of Missouri (not yet officially reported) is found in 19 South West-

ern Reporter (2) 732. The case is styled *State* v. *Baldwin's Estate* and bears number 28664 in the Supreme Court of Missouri, and was decided there by the court *en banc* on June 29, 1929. The opinion is set out in full in Printed Transcript of Record here at page 30 thereof, and the concurring opinion at page 38 thereof.

II.

JURISDICTION.

1. The date of the judgment to be reviewed is June 29, 1929 (R. 29). The motion for rehearing in the state court was denied on date of August 2, 1929 (R. 49).

2. The requirements of paragraph 1 of Rule 12, of the rules of this court, have been heretofore complied with by jurisdictional statement filed with the clerk of this court on November 4, 1929.

3. Jurisdiction has further been shown by brief filed herein on January 30th, 1930, to show cause in relation to final judgment under the state laws of Missouri and passed upon by order of this court on February 24th, 1930.

III.

STATEMENT OF THE CASE.

(Page references are to the printed transcript of the record.)

Carrie Pool Baldwin died testate in Quincy, Illinois, on October 4, 1926, a resident of Illinois (R.

30). Her will was probated in the State of Illinois and Thomas A. Baldwin, her only heir and the only legatee under the will, was appointed executor as provided by the will (R. 30). Inheritance tax was imposed and collected by the State of Illinois upon the land situated in Illinois and *all* of her intangible personal property (R. 27, 28). Ancillary letters of administration with will annexed were issued in Missouri, certain land being situated in Missouri (R. 11). Her estate consisted of land in the State of Illinois (R. 24) and Missouri (R. 12), which passed by the will, and intangible personal property of the decedent in the form of bank accounts, government bonds and promissory notes, both secured and unsecured, due from both residents of Missouri and nonresidents of Missouri (R. 4, 12).

Under Section 558 of the statutes (1919) of Missouri (see appendix hereof 37), designed to find taxable property, certain evidences of debt due the nonresident decedent were discovered in Missouri, and obedient to the command of the state statute were reported in course to the State Treasurer. This was all subsequent to the date of her death. The heir and the executor of the will of the domicile filed motion in the probate court in Missouri (which court had charge of the ancillary administration) praying the court to direct the administrator in Missouri to release the evidences of debt to the executor of the will in Illinois, which motion was overruled (R. 9).

An inheritance tax appraiser of Missouri appraised the debts due the nonresident decedent in the form

of bank accounts, government bonds and notes (R. 11), evidences whereof were found in Missouri. To this report exceptions were filed by the legatee under the will and the Missouri administrator, wherein attack was made on the assessment of such intangible property of a nonresident for inheritance tax in violation of the Fourteenth Amendment and Section 2 of Article 4, of the Constitution of the United States (R. 4). It was conceded at all times that inheritance tax on land in Missouri was a proper tax for the State of Missouri to impose (R. 16). The Missouri probate court approved the appraiser's report (R. 9) notwithstanding the exceptions filed thereto.

Upon appeal by the legatee under the will and the Missouri administrator the circuit court of Lewis County, Missouri, set aside that part of the judgment and ruling of the probate court that held that the intangible personal property of a nonresident decedent was taxable for inheritance tax purposes in Missouri (R. 1), and said judgment rendered in the circuit court of Lewis County, Missouri, excluded inheritance tax on the intangible personal property of the nonresident decedent sought to be taxed by the State of Missouri.

From the judgment of the circuit court the State of Missouri, through its officers and agents, lodged an appeal in the Supreme Court of Missouri (R. 10). That court thereupon, by its opinion and judgment (R. 30 to 47), held that regardless of all other questions intangible personal property of a nonresident decedent was within the jurisdiction of Missouri if any evidences of debt were found in Missouri, and subject to the

state inheritance tax under the Missouri statute. The portion of the statute that is material here is thus:

> "A tax shall be and is hereby imposed upon the transfer of any property, real, personal or mixed, or any interest therein, or income therefrom, in trust or otherwise, to persons, institutions, associations or corporations—when the transfer is by will, or intestate law of property within the state, or within the jurisdiction of the state and the decedent was a nonresident of the state at the time of his death." Section 558, Revised Statutes of Missouri, 1919.

(The complete section is set out in the appendix 37).

The opinion and judgment of the Supreme Court of Missouri was handed down on June 29th, 1929. Motion for rehearing was duly and timely filed, which motion was overruled by the Supreme Court of Missouri on August 2, 1929. Thereupon writ of error and appeal to the Supreme Court of the United States was timely procured and effected.

Of the items of the intangible personal property of the nonresident decedent, sought to be taxed by the State of Missouri upon transfer, some of the debtors were residents of the State of Missouri and some were nonresidents of the State of Missouri, some of the debts were secured by land in Missouri and some of the debts were unsecured (R. 8). The bank deposits in the amount of $17,015.75 were ordinary unsecured deposit accounts (R. 5), and the government bonds were registered noncoupon bonds (R. 5).

The Federal Constitution question was early raised in the case and has been preserved throughout

(R. 8, 9). The record is barren of any evidence or indication that a business situs was established in Missouri in any manner concerning any of the intangible personal property, nor did the State of Missouri as a litigant in the case ever undertake to show a business situs in Missouri as to any of the property. The questions presented by this appeal resolve themselves into a general query: May the State of Missouri assess an inheritance tax on intangible personal property of a nonresident decedent whose estate is duly administered upon by principal administration in the state of the domicile, and which said state of the domicile has duly assessed an inheritance tax on the same intangible personal property, where there is no business situs established in Missouri, even though certain evidences of debt may be found in Missouri, without being in direct conflict with the Fourteenth Amendment to the Constitution.

IV.

SPECIFICATIONS OF ERRORS.

1. The Supreme Court of Missouri below erred in finding and holding valid Section 558, Revised Statutes of Missouri, 1919 (Appendix p. 37), because said statute undertakes to impose inheritance tax upon intangible personal property of a nonresident decedent repugnant to the Fourteenth Amendment of the Constitution of the United States, to-wit: (a) Deprives of property without due process of law; (b) Denies

equal protection of the law; (c) Effort of one state to abridge the privileges and immunities of citizens of the United States.

2. The Supreme Court of Missouri below erred in finding and holding valid Section 558, Revised Statutes of Missouri, 1919 (Appendix p. 37), because the law is as announced by the decisions of this court (Supreme Court of the United States) that under the Constitution of the United States it is a violation of due process of law for two states, or all of the states, of the United States to tax the transfer or inheritance of the same property; and further because inheritance tax may now be exacted by but one state, and that is in this instance the State of Illinois, the situs of the property.

3. The Supreme Court of Missouri erred in sustaining the inheritance or transfer tax and imposing such tax upon intangible personal property owned by a nonresident decedent which passes by will to her son, a nonresident, and further because the same property passes but once and in but one state, which is, in the case of intangible personal, the state of the domicile of the decedent.

V.

ARGUMENT.

SUMMARY OF ARGUMENT.

POINT A.

The decision below is contrary to the record and the law.

POINT B.

The state statute involved may not, consistent with constitutionality, embrace intangible personal property of a nonresident decedent, which property has but one situs and there only may succession tax be imposed, and the domicile of the owner is the legal situs and taxable jurisdiction of intangible personal property.

POINT C.

Had not limitations been imposed by the Fourteenth Amendment of the Federal Constitution upon the taxing authority of the various states, commercial intercourse could not be carried on absent state treaties.

POINT D.

The physical presence of paper evidences of debt in Missouri does not fix the situs of the property there. There is no business situs under the facts established in Missouri and the court below does not find there

is. Inventory impelled under penalty by the state statute may not be means used by the state to acquire taxing jurisdiction, nor will the fact that the debt is secured by a land mortgage in the form of a lien only avail to fix the situs contrary to the domicile.

POINT A.

Short Survey of the Points in Opinion Below Holding Missouri Statute Constitutional.

The leading opinion of the Supreme Court of the State of Missouri herein holds that the State of Missouri may impose inheritance or succession tax upon the intangible personal property of a non-resident decedent, where evidences of debt are found in Missouri, without violating the Fourteenth Amendment of the Federal Constitution. The statute of Missouri sustained as being valid and not in violation of the Federal Constitution is Section 558 of the Revised Statutes of Missouri, 1919 (Appendix p. 37), the material parts of which statute are as follows:

> "Where the transfer is by will or by the intestate laws of this state from any person dying possessed of the property while a resident of this state. When the transfer is by will, or intestate law of property within the state or within the jurisdiction of the state and decedent was a non-resident of the state at the time of his death."

a. The court does not find and the facts do not justify or even indicate that there was a business situs of the property in the State of Missouri, notwithstanding the leading opinion contains speculation and recital

in this connection. The leading opinion of the court below also states and holds that if evidences of debt were in Missouri, they had to be in the hands of some agent. The suggestion or inference that the administrator was the agent does not take account of the fact that no administrator could have been in existence at the time of the death, hence the administrator could not have been the agent. A safety deposit vault may be said to be an agency for safe keeping but it would be enlarging upon the meaning of the words to say that because papers were in a safety deposit box or vault, the bank or institution controlling the vault was agent of the non-resident owner and hence the debts, of which the papers were evidence, had a business situs in the state. The question of business situs calls for a more extended consideration later in this brief.

b. The underlying theory of the decision in the state court below is that the situs of the property is in Missouri because the debtor lives in the State of Missouri and resort would have to be made to the Missouri courts to collect the debt, and for authority cites cases from the various state courts with the fountain source of all of them in *Blackstone* v. *Miller*, 188 U. S. 189 (it is not correct that the debtor in each instance resides in Missouri (R. 8)).

The concurring opinion of the state court below states (R. 43) that the case of *Blackstone* v. *Miller*, *supra*, goes:

> "upon the theory that money on deposit in a bank is the same in effect, as if the testator had placed the money in a deposit vault, and that,

therefore, it is property left by him within the state. It may be observed, however, that the argument, at least, of the United States Supreme Court in the Blackstone case, affirms the power of the state of the *debtor's* domicile to exact a tax, even in respect to ordinary debt" (italics ours).

Mindful that the case of *Blackstone* v. *Miller* was expressly and definitely overruled in *Farmers' Loan & Trust Co.* v. *State of Minnesota,* 280 U. S. 204, the above quotation is set forth to point out the underlying reasoning and theory of construction by the state court of the constitutionality of the Missouri statute, Section 558.

c. In the concurring opinion below, after having construed the statute to be broad enough to cover the intangible personal property of the non-resident decedent, the court says, "it remains to be determined whether from the nature of the property or from constitutional or other considerations, the statute may be held to apply in the case at bar" (R. 40). "The validity, thereof, under the constitution, state and federal, of the statute authorizing the imposition of inheritance tax under the facts in the case at bar, is of moment in the determination of this case" (R. 41). In paragraph IV of said concurring opinion (R. 43) the court holds that the statute is not in violation of the provision of the state or federal constitution "that no person shall be deprived of property without due process of law." To the same effect is paragraph VII of the concurring opinion (R. 45, 46).

That the said section, 558, is in violation of the Fourteenth Amendment of the Constitution of the

United States we seek to show by authorities and argument later in this brief.

d. The opinion of the Supreme Court of the State of Missouri attempts to justify its holding by saying, though the property is not within the state it is "within the jurisdiction" of the state. This might aid in determining the extent to which the legislature has attempted to go in enactment but when weighed against the constitutionality, that is, when tested by due process, the state's restriction is not enlarged by adding thereto the words "within the jurisdiction."

Evidences of debt (such as notes) belonging to a resident of California passing east over Missouri by air route (not mail) are for strained point of construction within the jurisdiction of Missouri. Under Missouri interpretation of its statute, the death of the owner in California while the air conveyor was refueling in Missouri, would subject the securities to the statute, and the *State of Missouri* v. *Baldwin,* (19 S. W. (2) 732) would be authority therefor. Quoting from the opinion: "It would have been a proper subject of inquiry by the trial court how and why and under what conditions these evidences of debt were in this state, *but, whatever the determination of that question, the property was legally within the jurisdiction of—this state and subject to the tax*" (R. 37). The ruling is that regardless of how the evidences of debt came into Missouri, or regardless of the conditions under which they were in Missouri, any presence of the evidences of debt in Missouri made the intangible property of the non-resident decedent subject to inheritance tax of that state.

It is not another way of saying that the statute violates due process, to say, as does the opinion of the state court below: "That such double taxation is inequitable and should be remedied by statute does not affect the legal right to impose the tax. We are obliged to declare the law as the law makers have enacted it" (R. 37). Such words in an opinion of a state court construing a state statute do violence to the restriction: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws" (Fourteenth Amendment of Federal Constitution).

The court below seeks to gather from the words of the statute, Section 558, a distinction between property "within the state" and "property within the jurisdiction of the state." Such a construction of the statute of course cannot aid to evade the mandate of the Fourteenth Amendment of the Federal Constitution. Under the said Fourteenth Amendment property "within the state" and property "within the jurisdiction of the state" must be the same thing, otherwise many states might claim situs of the same property and consequently each impose a succession tax. A complete answer to the Supreme Court of the State of Missouri on the distinction between "within the state" and "within the jurisdiction of the state" may be found in the quotation below.

Rhode Island Hospital Trust Co. v. *Doughton*, 270 U. S. 69, loc. cit. 80:

"It goes without saying that a state may not tax property which is not within its territorial jurisdiction" (citations loc. cit. 81).

"In the matter of intangibles, like choses in action, shares of stock, and bonds, the situs of which is with the owner, transfer tax of course may be properly levied by the state in which he resides."

The authority of the State of Missouri may not be enlarged by the use of the term in her statute "within the jurisdiction of the state."

e. The opinion of the Supreme Court of Missouri hereinbelow concedes that, for the purpose of *property* tax on intangible personalty, the situs of the thing taxed is the domicile of the creditor and that another state not of the domicile may not impose a *property* tax thereon, for the thing of value, *i. e.*, the debt is not within the jurisdiction of any other state, and it would be unconstitutional and a violation of due process for a state not of the domicile to impose such *property* tax (R. 32). The opinion goes on to say however in effect that though that rule is well grounded in historic development of judicial meditation as to *property* tax, yet the rule is not applicable to transfer or inheritance tax. Viewed in the light of violation of due process of the Fourteenth Amendment, property tax and succession or inheritance tax may not be separated. The property is taxable in one place and the succession is taxable in one place.

In the latest expression of this court that we find, the tests for determining jurisdiction of the state is the same for both property tax and succession tax.

Rhode Island Hospital Trust Co. v. *Doughton*, 270 U. S. 69, loc. cit. 80:

> "The tax here is not upon property, but upon the right of succession to property, but the principle that the subject to be taxed must be within the jurisdiction of the state applies as well in the case of a transfer tax as in that of a property tax. A state has no power to tax the devolution of the property of a non-resident unless it has jurisdiction of the property devolved or transferred."

After recognition, in the state court hereinbelow, that the situs of intangible personal property for the purpose of *property* tax is with the domicile of the creditor, the court goes on to say:

> "If we could apply the same rule to an inheritance tax, we might have less difficult in disposing of this case" (R. 32).

The line of jurisdiction to tax may not be drawn in one place for property tax and in another for succession or transfer tax. What cannot be done directly may not be done indirectly.

POINT B.

The Character of the Property.

The evidences of debt here involved are of three kinds: bank deposits, government bonds and promissory notes. The bank deposits are evidenced by the books of the bank. This is nothing more than the personal record kept by an ordinary debtor on an open account. That a bank deposit is an ordinary debt is no longer an unsettled question.

Blodgett v. *Silberman*, 277 U. S. 1, loc. cit. 18:

"Among the other items is a savings account in New York which is certainly a choses in action and was properly treated as subject to the same rule."

7 Corpus Juris, 628:

"Where a general deposit is made, the title to the money deposited passes from the depositor to the bank, and the bank becomes the debtor to the depositor in a like amount. Such deposits possess no trust quality, and in case of failure of the bank the depositor has no right to any preference but shares *pro rata* with the general creditors."

Bonds are not things tangible but are evidences of debt only. A letter acknowledging a debt would fall in the same category. They both acknowledge a debt. A debt is intangible.

Blodgett v. *Silberman*, 277 U. S. loc. cit. 14:

(1928) "We think bonds are not thus distinguishable from other choses in action."

Loc. cit. 17. "The analogy between furniture and bonds cannot be complete because bonds are representative only and are not the thing represented."

Promissory notes have ever been held not things of value in themselves but evidences of debt, the thing of value being the debt. A debt is intangible.

State Tax on Foreign Held Bonds, 15 Wall. 300; 21 L. Ed. 179:

"To call debts property of the debtors is simply to misuse terms. All the property there can be in the nature of things, in debts, belongs to

the creditors to whom they are payable, and follows their domicile wherever that may be. Their debts can have no locality separate from the parties to whom they are due."

Rhode Island Hospital Trust Co. v. *Doughton*, 270 U. S. 69 loc. cit. 81 (1926):

> "In the matter of intangibles, like choses in action, shares of stock, and bonds, the situs of which is with the owner, a transfer tax, of course, may be properly levied by the state in which he resides."

Farmers' Loan & Trust Co. v. *State of Minnesota*, 280 U. S. 204, loc. cit. 211:

> "While debts have no actual territorial situs we have ruled that a state may properly apply the rule *mobilia sequuntur personam* and treat them as localized at the creditor's domicile for taxation purposes."
>
> *Blodgett* v. *Silberman*, 277 U. S. 1.

Intangible personal property is a mere right and the right is the debt and the debt is property with the creditor and follows him inseparably. It may no longer be questioned that the situs of intangible personal property is the domicile of the owner of the choses in action or debt.

Succession Tax May Be Imposed only at the Legal Situs.

It is now held and properly so that the devolution of property is taxable at the actual situs thereof and any effort to tax elsewhere contravenes the due process of law clause of the 14th Amendment of the Constitution of the United States. *Frick* v. *Pennsylvania*, 268 U. S. 473. And further that "intangibles like choses

in action," ordinary debts, as bank deposits and bonds, have their situs with the owner. *Rhode Island Hospital Trust Company* v. *Doughton*, 270 U. S. 69. Therefore ordinary debts due a non-resident decedent have a foreign situs and cannot be taxed for inheritance transfer in Missouri.

Farmers' Loan & Trust Co. v. *State of Minnesota*, 280 U. S. 204.
Safe Deposit & Trust Co. v. *Virginia*, 280 U. S. 83.

The analysis of the question of taxation here strikes at the root of governmental operation. The collection of taxes is necessary for the operation of the government that liberty, life and property may not be impaired. Along with this necessary element of government operation arises between the states the natural avaricious desire that the people and property of other states maintain the institution of state government to relieve natives of that burden. Indulgence of this reaches the point of confiscation of property designed to be protected. The attorney general of Missouri recognizes that it is essential that free commercial intercourse along border lines be encouraged; that a state line not as wide as a street may be a pitfall when use is made of a deposit vault on the other side thereof. The various fictions made use of by the states to tax the intangible personal property of a non-resident decedent would have astounded the law makers who wrote the constitution. They could foresee however that a union of sovereign states could not exist without a parental or superintending control of their

interstate relations, leaving their intrastate concerns to their sovereign authorities.

If the door were opened for a multiplicity of states to impose succession tax on the same property, special officers of each state would be created to see if by some means the state could not exact toll on the transfer of intangible property of non-residents to non-residents, and the result would be that if there was any property within the jurisdiction of the state, for instance, Missouri, such as land, then the land might be subject to the lien of all the theories of succession tax that might be ingeniously designed. To avoid confiscation of property and yet to give full force and effect to constitutional taxing provisions, human rule of action impels that but one state be permitted to tax the devolution of the same property and that state is the state of the legal situs. It follows that Section 558 of the statutes of Missouri violates the Constitution of the United States insofar as it undertakes to impose succession tax upon intangible personal property of the non-resident decedent.

Farmers' Loan & Trust Co. v. *State of Minnesota*, 280 U. S. 204, loc. cit. 212:

> "We have determined that in general intangibles may be properly taxed at the domicile of their owner and we can find no sufficient reason for saying that they are not entitled to enjoy an immunity against taxation at more than one place similar to that accorded to tangibles."

The Domicile of the Owner Is the Legal Situs of Intangible Personal Property.

It may no longer be questioned that the situs of intangible personal property is the domicile of the owner of the choses in action or debt.

Blodgett v. *Silberman*, 277 U. S. 1, loc. cit. 9:

> "At common law the maxim '*mobilia sequunter personam*' applied. There has been discussion and criticism of the application and enforcement of that maxim, but it is so fixed in the common law of this country and of England, in so far as it relates to intangible property, including choses in action, without regard to whether they are evidenced in writing or otherwise and whether the papers evidencing the same are found in the state of the domicile or elsewhere, and is so fully sustained by cases in this and other courts, that it must be treated as settled in this jurisdiction whether it approve itself to legal philosophic test or not."

State Tax on Foreign Held Bonds, 15 Wall. 300, 320; 21 L. Ed. 179:

> "To call debts property of the debtors is simply to misuse terms. All the property there can be in the nature of things in debts belongs to the creditors, to whom they are payable, and follows their domicile, wherever that may be. Their debts can have no locality separate from the parties to whom they are due."
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> *Farmers' Loan & Trust Co.* v. *State of Minnesota*, 280 U. S. 204.

Rhode Island Hospital Trust Co. v. *Doughton*, 270 U. S. 69, loc. cit. 81:

> "In the matter of intangibles, like choses in action, shares of stock, and bonds, *the situs of*

which is with the owner, a transfer tax, of course, may be properly levied by the state in which he resides" (italics ours).

The conflict here being between the State of Illinois and the State of Missouri, we take it is not amiss to direct attention to this last word of the highest court of the State of Illinois on the question of legal situs of intangible personal property and the right to impose succession tax.

The People v. *Forman,* 322 Illinois Reports, 223, loc. cit. 230:

"We attach no significance to the fact that the note was in Iowa under those conditions and not in Illinois in the possession of the payee. The situs of intangible property, to which division of property a promissory note belongs, in contemplation of law is the domicile of the testator. The rule is well established by the decisions of this court and of the United States courts that the situs of intangible property owned by a decedent in his lifetime is the domicile of the decedent, and that an inheritance tax on such property should be assessed at the domicile of the decedent, only, as between the contentions of states over that question, and that promissory notes, etc., are intangible property. (*Davis* v. *Upson,* 230 Ill. 3271; *Cooper* v. *Beers,* 143 Id. 25; *National Reserve Ins. Co.* v. *Shipton,* 314 Id. 472; *People* v. *Blair,* 276 Id. 623; *Frick* v. *Commonwealth of Pennsylvania,* 45 Sup. Ct. Rep. 603.) In the last case cited the Supreme Court of the United States in a well considered case held that tangible personal property was taxable at the situs or place where the property is situated, only, and that intangible property was assessable, under the inheritance tax laws, at the domicile of the testator or of the decedent, only, and that for a state to

doubly tax either character of property in violation of the above rule was in violation of the due process clause of the constitution."

Occasion to resort to the courts of the state claiming the right to tax succession of intangible personal property of the nonresident decedent may not be held as ground to sustain the tax. If tribute may be laid on the privilege of using the courts of a sister state it would lead to disintegration of the union.

Farmers' Loan & Trust Co. v. *State of Minnesota*, 280 U. S. 204:

> "And, while the creditor may rely on Minnesota law to enforce the debt, that may be equally true of the law of any other state where the debtor or his property may be found."

International Text-Book Co. v. *Pigg*, 217 U. S. 91, loc. cit. 111:

> "This court held in *Chambers* v. *Baltimore & Ohio R. R. Co.*, 207 U. S. 142, 148 (28 Sup. Ct. 34, 52 L. Ed. 143), that a state may, subject to the restrictions of the Federal Constitution, 'determine the limits of the jurisdiction of its courts, and the character of the controversies which shall be heard in them.' But it also said in the same case: 'The right to sue and defend in the courts is the alternative of force.' In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the states, but is granted and protected by the Federal Constitution."

Hence one state may not make its tax gathering procedure a parasite upon the comity between states, whereby to abridge the rights and immunities of citizens of other states.

POINT C.

Necessity of and Reason for the Restriction on Multiple Taxation.

The reason underlying the necessity for the constitutional limitation imposed upon the respective states in reference to power to tax is announced through Chief Justice John Marshall in the early case of *McCullough* v. *Maryland*, 4 Wheaton 316, loc. cit. 431, thus:

> "That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied." • • • l. c. 405. "Though any one state may be willing to control its operations, no state is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason: the people have, in express terms, decided it, by saying, 'this constitution, and the laws of the United States, which shall be made in pursuance thereof,' 'shall be the supreme law of the land,' and by requiring that the members of the state legislatures, and the officers of the executive and judicial departments of the states, shall take the oath of fidelity to it."

This rule is recognized in *United States* v. *Bennett*, (1914), 232 U. S. 299, loc. cit. 306:

> "The application to the states of the rule of due process relied upon comes from the fact that their spheres of activity are enforced and protected by the constitution, and therefore it is impossible for one state to reach out and tax property in another without violating the constitution, for where the power of the one ends the authority of the other begins."

A state is wholly without power to tax property beyond its jurisdiction.

Farmers' Loan & Trust Co. v. *State of Minnesota*, 280 U. S. 204.

International Paper Co. v. *Commonwealth of Mass.* 246 U. S. 135.

State Tax on Foreign Held Bonds, 15 Wall. 300; 21 L. Ed. 179.

Wachovia Bank & Trust Co. v. *Doughton*, 272 U. S. 567.

The most recent consideration by this court of the matter involved concerning the necessity of restricting many states from levying a transfer tax on the same property was in 1925. There this court after deliberate consideration, taking into account the trend of various states to impose succession tax under many theories, held due process of law is violated when a state seeks to impose a tax without the power to impose it.

Frick v. *Pennsylvania*, 268 U. S. 473 loc. cit. 488:

> "There are many decisions dealing with cognate questions which point the way to its solution. These decisions show, first, that the exaction by a state of a tax which it is without power to impose is a taking of property without due

process of law in violation of the 14th Amendment."

Louisville & Jeffersonville Ferry Co. v. *Kentucky*, 188 U. S. 385, loc. cit. 396:

"While the mode, form, and extent of taxation are, speaking generally, limited only by the wisdom of the legislature, that power is limited by a principle inhering in the very nature of constitutional government, namely, that the taxation imposed must have relation to a subject within the jurisdiction of the taxing government."

Loc. cit. 397: "A state can no more subject to its power a single person or a single article of property whose residence or legal situs is in another state, than it can subject all the citizens or all the property of such other state to its power. Cooley on Taxation, 2d ed. p. 159."

It was there held the intangible personal property (called incorporeal hereditament) had its legal situs in Indiana in the form of a franchise and could not be taxed in Kentucky.

The law of this country has been well settled that it is a violation of due process for two states to impose transfer or inheritance tax upon the same tangible property, holding that the situs of tangible property is the state wherein it is permanently kept and that the fiction of taxing under the *universitas* may not be applied.

Frick v. *Pennsylvania*, 268 U. S. 473.

Likewise intangibles may be burdened with succession tax but once and that the situs of the thing to be taxed.

Farmers' Loan & Trust Co. v. *State of Minnesota*, 280 U. S. 204, loc. cit. 212:

> "A very large part of the country's wealth is invested in negotiable securities whose protection against discrimination, unjust and oppressive taxation, is matter of the greatest moment. • • • Taxation is an intensely practical matter, and laws in respect of it should be construed and applied with a view of avoiding, so far as possible, unjust and oppressive consequences. We have determined that in general intangibles may be properly taxed at the domicile of their owner, and we can find no sufficient reason for saying that they are not entitled to enjoy an immunity against taxation at more than one place similar to that accorded to tangibles. The difference between the two things, although obvious enough, seems insufficient to justify the harsh and oppressive discrimination against intangibles contended for on behalf of Minnesota."

POINT D.

Presence of the Evidences of Debt in Missouri.

Pursuing the fundamental principles, the mere physical presence of evidences of debt, such as a note, bond or accounting books of a bank, in a state not of the domicile does not affect the rule. The cases seem quite well agreed that a debt intangible in form cannot acquire a situs merely for the purpose of taxation. In other words, the courts have never gone to the extent of arbitrarily saying that the situs of the intangible property is at the state of the domicile but that we will create for the purpose of taxation only another situs in another state not of the domicile.

Blodgett v. *Silberman*, 277 U. S. 1, loc. cit. 9:

"At common law the maxim '*mobilia sequunter personam*' applied. There has been discussion and criticism of the application and enforcement of that maxim, but it is so fixed in the common law of this country and in England, in so far as it relates to intangible property, including choses in action, without regard to *whether they are evidenced in writing or otherwise and whether the papers evidencing the same are found in the state of the domicile or elsewhere*, and is so fully sustained by cases in this and other courts, that it must be treated as settled in this jurisdiction whether it approve itself to legal philosophic test or not" (italics ours).

Mindful that under the more recent holdings the measure of jurisdiction of a state is not unalike for property tax and transfer tax as shown above in this brief we refer for further authority to a property tax case of this court.

In the case of *Buck* v. *Beach*, 206 U. S. 392; the State of Indiana sought to place a direct property tax upon promissory notes owned by a nonresident, and the Supreme Court of the State of Indiana held same taxable in Indiana on the theory that the situs of the property was in Indiana because of the physical presence in Indiana of the notes themselves. In the course of its opinion this court said:

Buck v. *Beach*, 206 U. S. 392, loc. cit. 408.

"The presence of the notes in Indiana formed no bar to the right, if it otherwise existed, to taxing the debts evidenced by the notes in Ohio. It does, however, tend to prevent the taxation in one state of property in the shape of debts not existing there, and which, if so taxed, would make

double taxation almost sure, which is certainly not to be desired, and ought, wherever possible, to be prevented. For the reason that, as the assessment in this case was made upon property which was never within the jurisdiction of the State of Indiana, the state had no power to tax it, and the enforcement of such a tax would be the taking of property without due process of law."

No Question of Business Situs Is Here Involved.

There is no Missouri business situs involved in relation to the intangible property of Carrie Pool Baldwin. Nor does the decision of the Supreme Court of Missouri below, hold that there is a business situs in Missouri, notwithstanding its comment of doubt. This court, therefore, does not have such question before it. Slight reference might be made however to the unmerited comment of the Supreme Court of Missouri on a business situs. The appellants here prevailed in the trial court. The record was prepared and brought from the trial court to the Supreme Court of Missouri by the appellee here, the State of Missouri. Certain evidences of debt were found in safety deposit box in a Missouri bank, further the record evidence is barren. The State of Missouri did not show, permit a showing or create and bring up a record showing the duration or circumstances of the papers found in the strong box, and no court could find from the facts in the record that a business situs was established or existing. May a court presume matters not in the record.

The consideration of a business situs, of course, may not be used to enlarge restriction of the Federal

Constitution. That is to say, if a business situs is actually established it must be under such circumstances as relieve the property of the burden of succession tax in the domiciliary state. Otherwise due process of law would be denied. There was no business situs here nor was there any element of such.

A business situs arises only where "the owner has caused them (choses in action) to become integral parts of a localized business."

Farmers' Loan & Trust Co. v. *State of Minnesota,* 280 U. S. 204, loc. cit. 210.

Examples of such instances are where foreign corporations or individuals have a business agent or agency in the state seeking to tax and there loan and collect money or transact business in and through the established agency. It partakes more of a tax on the capital of a business situs.

In Relation to Inventory in Missouri.

The Missouri statute, Section 568 (Appendix p. 39) provides that any banking institution or safety deposit box company must give notice to the state treasurer before permitting the removal of the papers from the lock box of any deceased. Thereupon all evidences of debt, be they letters acknowledging indebtedness, notes, bonds or whatsoever, are, under penalty imposed upon the institution, forced to be reported to the state treasurer, who is the receiving officer for inheritance tax, Section 565 (Appendix p. 38). This is true of course even though the evidence of debt may not belong to the deceased but to some-

one else. Sections 571 and 573 (Appendix p. 41) provide that the appraiser appointed shall, through the probate court, report the property listed to the state treasurer. Section 564 (Appendix p. 38) makes the administrator personally liable for inheritance tax. If the administrator therefore paid the tax on intangible personal property of a nonresident decedent, and it was not legally taxable, he would then be liable to the foreign executor. On the other hand, if the Missouri administrator declined to pay the tax and made distribution and the State of Missouri should by suit or claim thereafter pursue the administrator for the tax on the intangible personal property of a nonresident decedent and recover, the administrator personally would be liable therefor.

Hence it was for the protection of the administrator pending construction of the statute that the intangible property became inventoried. The objection to such listing of the intangible property in Missouri was registered on the part of the heir and executor of the will in Illinois by the motion filed in the probate court and refiled in the Circuit Court, to compel the administrator to surrender up the evidences of the debts. The provisions of Section 568 (Appendix p. 39), requiring notice to the state treasurer, are designed to reach and find *taxable* property and not to make taxable such property as is otherwise *not* subject to transfer tax.

The point made by the Supreme Court of Missouri that the intangible property of the Carrie Pool Baldwin estate is taxable in Missouri, because reported

to the state treasurer and inventoried there, is not conceived in logic. For if it only became taxable upon report and inventory Missouri had no jurisdiction theretofore. If such were the law, then by the aid of its statute requiring report of all evidences of debt found in lock box of a decedent in Missouri, the state would make property taxable which without the statute would not be taxable. This effort by means of statute and holding of the Supreme Court of Missouri to tax property and persons beyond its jurisdiction takes its place as a new state theory advanced, to be added to the many heretofore state devised theories, to reach beyond its borders for taxing purposes contrary to limitations of the Fourteenth Amendment of the Federal Constitution.

Fact That Note Secured by Mortgage on Land in Missouri Does Not Alter the Status or Situs of the Debt.

It is not the purpose to raise a question foreign to the issues made by the opinion of the Missouri Supreme Court below. Notwithstanding this court in its consideration of the case at bar may desire reference to the status of a land mortgage security in Missouri.

No division of land interest between the mortgagor and the mortgagee is created by the execution of a mortgage security in Missouri. The lien is a mere incident that follows the debt as a shadow.

The law of Missouri on that question is reannounced in the citation and quotation below and there has been no qualification of the rule since that time though on several occasions reannouned.

Missouri Real Estate & Loan Co. v. *Gibson,* 282 Mo. 75 loc. cit. 79 (1920):

> "Notwithstanding a few attributes that still inhere in it as a result of its common-law origin, a mortgage, or deed of trust in the nature of a mortgage, given on land to secure the payment of a debt, is now regarded in this state as being, in its last analysis, a lien and nothing more. *Dickerson* v. *Bridges,* 147 Mo. 235, 244; *Terminal Ice & Power Co.* v. *Ins. Co.,* 196 Mo. App. 241, 248. So viewed, it is neither an estate in land, nor a right to any beneficial interest therein. It is neither *jus in re* nor *jus ad rem.* It is merely the right to have the debt, if not otherwise paid, satisfied out of the land. The debt is the essence of the mortgage, the lien a mere incident that follows it as a shadow (*Lipscomb* v. *Talbott,* 243 Mo. 1, 31), and which, in and of itself, apart from the debt, is so intangible that it cannot be assigned (*Thayer* v. *Campbell,* 9 Mo. 280), nor levied upon or sold on execution (19 R. C. L. 311, Sec. 87)."

Hence no question can arise here concerning the decedent having an interest or share in the land with the mortgagor by reason of mortgage securing indebtedness.

As bearing upon this aspect of the case, citation and quotation is made from the early case of *Kirtland* v. *Hotchkiss, infra,* which is cited with approval in *Blodgett* v. *Silberman,* 277 U. S. 1.

Kirtland v. *Hotchkiss,* 100 U. S. 491, loc. cit. 498:

> "The question does not seem to us to be very difficult of solution. The creditor, it is conceded, is a permanent resident within the jurisdiction of the state imposing the tax. The debt is property in his hands constituting a portion of his wealth, from which he is under the highest obligation, in

common with his fellow-citizens of the same state, to contribute for the support of the government whose protection he enjoys.

"That debt, although a species of intangible property, may, for purposes of taxation, if not for all others, be regarded as situated at the domicile of the creditor. It is none the less property because its amount and maturity are set forth in a bond. That bond, wherever actually held or deposited, is only evidence of the debt, and if destroyed, the debt—the right to demand payment of the money loaned, with the stipulated interest—remains. Nor is the locality of the debt, for the purposes of taxation, affected by the fact that it is secured by mortgage upon real estate situated in Illinois. The mortgage is but a security for the debt, and, as held in State Tax on Foreign-Held Bonds (*supra*), the right of the creditor 'to proceed against the property mortgaged, upon a given contingency, to enforce by its sale the payment of his demand—has no locality independent of the party in whom it resides. It may undoubtedly be taxed by the state when held by a resident therein,' etc., Cooley on Taxation, 15, 63, 134, 270. The debt then having its situs at the creditor's residence, both he and it are, for the purposes of taxation, within the jurisdiction of the state."

No other decisions of this court are found dealing with the point of a land mortgage security as affecting the situs of a debt so secured, where, under the state law, the mortgage was a lien only contrary to a situation where the mortgagee acquired an interest in the land itself.

There are state court decisions decided prior to *Farmers' Loan and Trust Co.* v. *State of Minnesota*, 280 U. S. 204, that follow *Blackstone* v. *Miller*, 188 U. S. 189, but though following Blackstone vs. Miller, dif-

ficulty has been there experienced in practical application that has in many instances driven the state courts to abandon their mortgage situs theory where a state not of the domicile sought to use it to tax intangible property beyond its jurisdiction.

Examples of this character arise where a mortgage to secure a debt is given on lands in more than one state. If it may be said that the situs of a land mortgage secured debt is where the land lies, it is as true where the land lies in several states as where the land lies all in one state. Following this to its conclusion, a railroad mortgage would fix the situs in perhaps ten states or more.

As stated above, state courts, though making effort to follow Blackstone vs. Miller, were not able to claim situs under the land mortgage theory where the land was situated in more than one state.

In re Ward's Estate;
Chadwick v. *State,* (1916) 133 Minn. 117.
McLaughlin v. *Cluff,* (1925) 66 Utah 245.

Another practical difficulty might be suggested. Assuming that the mortgage situs theory prevailed, A is mortgagor in Missouri, and B is mortgagee, a non-resident, hence the situs of the debt in Missouri because of land mortgage; and assume thereupon A suffered the land to be sold for non-payment of taxes and C became the purchaser of course clear of incumbrance; B still has his note as creditor and if A is solvent has property rights; may it be said that the situs transfers from one state to another because of

tax sale; then if A were permitted to redeem under the law and did so, would the situs return to Missouri.

The test of a profound principle of law is found in its application. It seems apparent that intangible personal property may have but one situs, and that is with the creditor.

It is submitted that this question has, however, been decided and determined by this court in the year 1928, in the case of *Blodgett* v. *Silberman*, 277 U. S. 1, where this court expressly approved the language of *Kirtland* v. *Hotchkiss*, 100 U. S. 491, and quotes therefrom, to-wit: "nor is the debt, for the purpose of taxation, affected by the fact that it is secured by mortgage upon real estate situated in Illinois. • • • The debt, then, having its situs at the creditor's residence, both he and it are, for the purpose of taxation, within the jurisdiction of the state."

Conclusion.

It is therefore respectfully submitted that the judgment appealed from should be reversed and the cause remanded to the Missouri Supreme Court below, to the end that the intangible personal property of the decedent domiciled in Illinois, and heretofore taxed for succession in Illinois, may be relieved of succession tax in Missouri, for the reason that the judgment of the Supreme Court of Missouri sustaining Section 558, of the Revised Statutes of Missouri, 1919, and the provisions thereof, undertaking to tax property beyond the

jurisdiction of Missouri, is in conflict with and repugnant to the Fourteenth Amendment of the Federal Constitution, and violates due process of law.

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APPENDIX.

(A revision of the Missouri Statutes was made by the 1929 General Assembly of Missouri, but it is not yet published and distributed.)

The following citations of Missouri Statutes are by section number of the 1919 Revised Statutes of Missouri, with reference to the Session Acts where amendments have been made and published in the Session Acts by the biennial sessions of the General Assembly.

Section 558, Revised Statutes of Missouri, 1919, Chapter 1, Article XXI:

"A tax shall be and is hereby imposed upon the transfer of any property, real, personal or mixed or any interest therein or income therefrom, in trust or otherwise, to persons, institutions, associations, or corporation, not hereinafter exempted, in the following cases: When the transfer is by will or by the intestate laws of this state from any person dying possessed of the property while a resident of the state. When the transfer is by will, or intestate law of property within the state or within the jurisdiction of the state and decedent was a non-resident of the state at the time of his death. When the transfer is made by a resident or by a non-resident when such non-resident's property is within this state, or within its jurisdiction, by deed, grant, bargain, sale or gift made in contemplation of the death of grantor, vendor or donor, or intending to take effect in possession or enjoyment at or after such death. Every transfer by deed, grant, bargain, sale or gift made within two years prior to the death of grantor, vendor or donor, of a material part of

his estate or in the nature of a final disposition or distribution thereof without an adequate valuable consideration shall be construed to have been made in contemplation of death within the meaning of this section. Such tax shall be imposed when any person, association, institution or corporation actually comes into the possession and enjoyment of the property, interest therein, or income therefrom, whether the transfer thereof is made before or after the passage of this act: Provided, that property which is actually vested in such persons or corporations before this act takes effect shall not be subject to the tax."

Section 564, Revised Statutes of Missouri, 1919, Chapter 1, Article XXI:

"All executors, administrators and trustees of any estate, property, interest therein, or income therefrom so transferred shall be personally liable for such tax and interest until they are paid. Any executor, administrator or trustee shall have full power to sell so much of the property of decedent as will enable him to pay said tax in the same manner as they may be enabled to do by law for the payment of the debts of the estate and the interest of said tax shall be paid as hereinafter directed."

Section 565, Revised Statutes of Missouri, 1919, Chapter 1, Article XXI, amended 1921, Session Acts 1921, page 113:

"Every sum of money retained by any executor, administrator, or trustee or paid into his hands for any tax on any property or derived from any source whatever for the payment of any such taxes shall be paid by him within thirty days thereafter into the state treasury except two and one-half per cent of such tax which he shall pay to the probate judge for his fees. Upon the payment to the state treasurer of any taxes due under this

act, such treasurer shall issue a receipt therefor in triplicate, one copy of which he shall deliver to the person paying said tax and the original and one copy of which he shall immediately send to the state auditor whose duty it shall be to charge the treasurer so receiving the tax with the amount thereof and said auditor shall retain one of said receipts and the other he shall countersign and seal with the seal of his office and immediately transmit to the clerk of the court fixing such tax and no executor, administrator, or trustee shall be entitled to credit in his accounts or be discharged from liability from said tax, nor shall said estate be distributed or closed unless a receipt so sealed and countersigned by the state auditor or a copy thereof duly certified by him shall have been filed with the court."

Section 568, Revised Statutes of Missouri, 1919, Chapter 1, Article XXI:

"If a foreign executor, administrator, or trustee shall assign or transfer any stock or obligation in this state standing in the name of the decedent or in trust for a decedent liable for any such tax, the tax shall be paid to the state treasurer on the transfer thereof. No safe deposit company, trust company, corporation, bank or other institution, person or persons having in possession or under control securities, deposits, or other assets belonging to or standing in the name of a decedent who is a resident or non-resident, or belonging to or standing in the joint names of such a decedent and one or more persons, including the shares or capital stock or other interest in a safe deposit company, trust company, corporation, bank or other institution making a delivery or transfer herein provided, shall deliver or transfer the same to the executor, administrator, or legal representative of said decedent or the survivor or survivors when in the joint name of a decedent and

one or more persons or upon their order or request unless notice of the time and place of such intended delivery or transfer be served upon the state treasurer and attorney general at least ten days prior to said delivery or transfer; nor shall any safe deposit company, trust company, corporation, bank or other institution, person or persons, deliver or transfer any securities, deposits, or other assets belonging to or standing in the name of decedent or belong to or standing in the joint names of a decedent and one or more persons, including the shares of capital stock of or any other interest in the safe deposit company, trust company, corporation, bank or other institution making the delivery or transfer without retaining a sufficient portion or amount thereof to pay any tax or interest which may thereafter be assessed on account of the delivery or transfer of such securities, deposits, or other assets, including the shares of capital stock or other interest in the safe deposit company, trust company, corporation, bank or other institution making the delivery or transfer under the provisions of this article unless the state treasurer and the attorney general consent thereto in writing. And it shall be lawful for the state treasurer, together with the attorney general, personally or by representative, to examine said securities, deposits or assets at the time of such delivery or transfer. Failure to serve such notice or failure to allow such examination or failure to retain a sufficient portion or amount to pay such tax or interest as herein provided shall render said safe deposit company, trust company, corporation, bank or other institution, person or persons liable to the payment of the amount of the tax and interest due or thereafter to become due upon said securities, deposits, or other assets, including the charges of capital stock of, or other interest in the safe deposit company, trust company, corporation, bank or other institution making the delivery or transfer, and in addition thereto a penalty of one thousand dollars; and the payment of such

tax and interest therein or the penalty above prescribed or both may be enforced in an action brought by the state treasurer in any court of competent jurisdiction."

Section 571, Revised Statutes of Missouri, 1919, Chapter 1, Article XXI, amended 1921, Session Acts 1921, page 116:

"The appraiser shall appraise all property, estate, assets, interest or income at its clear market value and he is hereby authorized to issue subpoenas and compel the attendance before him of witnesses and the production of books, records, documents, papers and all other material evidence, to administer oaths and to take the testimony of all witnesses under oath. He shall make report of his appraisement to the court in writing and shall return the testimony of the witnesses and all other evidence and such other facts in relation thereto as the court may by its order require, and such report shall be made within twenty days after the appointment of such appraiser, unless the court, for good and sufficient cause, by order gives such appraiser further time in which to report: Provided, when the estate consists of personal property only, the prosecuting attorney may, with the consent of the state treasurer, agree with the parties liable to pay any tax upon the amount of the same, and the court, if it approves such agreement, shall enter judgment accordingly and no appraiser shall be appointed."

Section 573, Revised Statutes of Missouri, 1919, Chapter 1, Article XXI:

"The report of the appraiser shall be filed with the court in duplicate, one of which duplicate copies, together with the certificate of the court or clerk shall be forwarded to the state treasurer within five days after the amount of said tax shall be fixed."